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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

RAWL SALES AND PROCESSING COMPANY,
Petitioner,

v.

TRUSTEES, UNITED MINE WORKERS OF AMERICA 1950 PENSION TRUST, *et al.*
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF AMICI CURIAE AGIPCOAL USA, INC., ALOE COAL COMPANY, BEILCHICK BROTHERS, BENTLEY COAL COMPANY, INC., BIG TRACK COAL CO., INC., CANTERBURY COAL COMPANY, TANOMA MINING COMPANY, INC., VALLEY COAL COMPANY, DOUBLE R TRUCKING COMPANY, OLD RALPH MINING COMPANY, INC., SOURWOOD ENTERPRISES, INC., DOSS FORK COAL CORPORATION, INC., McKINNEY TRUCKING COMPANY, INC., PATTY CHANDLER TRUCKING, INC., SAN-WEST COAL COMPANY, SPRING RIDGE COAL CO., INC., COLEMAN & YATES COAL COMPANY, INC., and MULLINS & STANLEY TRUCKING COMPANY, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Amici adopt the Questions Presented set forth in the Petition for Writ of Certiorari.

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IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICI CURIAE

This brief *amicus curiae* is filed in support of the petition for writ of certiorari.[1] Each of the *amici* are companies which were formerly signatory to collective bargaining agreements

[1] Pursuant to Supreme Court Rule 37.2, this brief is filed with the written consents of the parties which are filed concurrently herewith.

with the United Mine Workers of America ("UMWA") which called for them to contribute to the United Mine Workers of America 1974 Pension Trust, United Mine Workers of America 1950 Pension Trust, United Mine Workers of America 1974 Benefit Plan and Trust or the United Mine Workers of America 1950 Benefit Plan and Trust ("Trusts"). They either are no longer signatory to a collective bargaining agreement with the UMWA or signed agreements that called for contributions under terms different from the National Bituminous Coal Wage Agreement ("NBCWA") negotiated between the UMWA and the Bituminous Coal Operators Association ("BCOA"). Some *amici* are former members of the BCOA. Others signed so-called "me too" agreements, which are short-form documents adopting the NBCWA *in toto*. Still others have negotiated separate agreements which called for contributions to the trusts on a basis differing from that of the NBCWA. Each of the *amici* are defendants in cases which raise issues similar to those raised in the petition.[2]

The issues presented in the petition directly impact upon the *amici* as well as potentially hundreds of other coal companies, since the court of appeals' decision has made the BCOA the permanent bargaining representative for pension and benefit purposes of every coal company which has at any time since

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[2] *UMWA 1974 Pension Trust et al. v. A&E Coal Company, et al.*, CA No. 88-1126 (D.D.C.) (Agipcoal); *UMWA 1974 Pension Trust et al. v. Canterbury Coal Company*, CA No. 92-1856 (D.D.C.), *UMWA 1974 Pension Trust et al. v. Aloe Coal Company, et al.*, CA No. 91-0207 (D.D.C.) (Aloe, Beilchick, Bentley, Tanoma and Valley); and *UMWA 1974 Pension Trust et al. v. Big Star Coal Co., et al.*, CA No. 9300031-A (W.D.Va.) (Double R. Trucking, Big Track Coal, Old Ralph Mining, Sourdough Enterprises, Doss Fork, McKinney Trucking, Patty Chandler Trucking, San-West, Spring Ridge, Coleman & Yates, and Mullins & Stanley).

1978 participated in the Trusts. Indeed, the Trusts have indicated that there are numerous other potential defendants who may be the subject of future lawsuits if the decision of the court of appeals is allowed to stand.

STATEMENT OF THE CASE

The respondents contend, and the court of appeals found, that the trust documents which have been incorporated by reference in each NBCWA since 1978 contain a clause which requires any employer that ever contributed to the Trusts to continue to be bound by the terms of the trust agreements negotiated (and later amended) by the BCOA and UMWA, even after the expiration of the NBCWA to which that employer was signatory.[3] Thus, for example, if an employer was a signatory to the 1978 agreement, (which terminated on March 27, 1981) even today that employer must abide by the terms of the Trusts, as amended to date, including making contributions to the Funds at the rates negotiated by the BCOA and UMWA in subsequent NBCWA's. According to this theory, this is so even if that employer has no current collective bargaining agreement calling for such contributions, has negotiated a different arrangement with the UMWA, or its employees are no longer even represented by the UMWA.

There are four Trusts at issue in this case. The 1950 and 1974 Pension Trusts, as their names imply, provide pension benefits to UMWA retirees. The 1950 and 1974 Benefit Plans and Trusts were created to provide health and other non-pension benefits to these same retirees and their dependents. Both 1950

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[3] This clause came to be referred to by respondents' counsel as the "evergreen" clause sometime after respondents filed the first of these lawsuits. The respondents only arrived at their current interpretation in March 1988, ten years after the clause was negotiated. *Amici* have disputed the meaning of this clause, but will refer to it as the "evergreen" clause for the sake of convenience. In doing so, *amici* do not concede that the interpretation placed on the clause by the Trustees or the court of appeals is correct.

plans are limited to employees who retired prior to January 1, 1976 and their dependents. The 1974 plans were designed to cover employees who retired after December 31, 1975 and their dependents. Many of the *amici* have no former employees who retired prior to 1976. Thus, they have no employees who have participated or ever will participate in the 1950 plans. Nevertheless, under the respondents' theory, they would be required to contribute to these funds as long as the UMWA and BCOA agree that such contributions are required.

The "evergreen" clause is not merely limited to an obligation to make future contributions to the Trusts. Rather, it purports to require employers to comply with all "terms and conditions" of the Trusts, as modified from time to time by the BCOA and the UMWA. The BCOA and the UMWA can and do routinely alter not only such terms as the rate of contributions and the method of computing such contributions, but also the level of benefits provided, vesting requirements, and even basic requirements for benefit eligibility. Given the scope of the settlors' authority and the range of terms they can determine, the clause constitutes a permanent designation of the BCOA as the collective bargaining representative for purposes of negotiating pension and health benefits for all employers who have at any time since 1978 participated in the Trusts.

Unlike the NBCWA's negotiated periodically since 1950, each of which expired after a designated date, the Trusts are perpetual. Since the terms of the Trusts are perpetual, they can only be changed by agreement of both settlors, the UMWA and the BCOA. Thus, unlike the terms and conditions of the NBCWA itself, which can be modified by either party at its expiration by that party simply refusing to enter into a new agreement containing an objectionable provision, each settlor has a virtual veto as to changes in the trust documents. Thus, if the court of appeals' decision is correct, the BCOA is placed in a position where it can keep its competitors in the Funds so long

as the BCOA deems it to be in its own best interest.[4] Even if the UMWA wished to negotiate different terms with other employers, it could not do so without the BCOA's consent. Thus, while the former signatories would be required to contribute indefinitely to the Trusts regardless of their individual needs, there is no reciprocal requirement on the part of the BCOA. The BCOA is free to stop all payments into the Funds at the expiration of an NBCWA simply by exercising its discretion not to agree to new contributions.

This case presents questions of law which will have a wide-ranging effect on the entire coal industry.[5] The *amici* will be directly affected by the court of appeals' decision as will every coal company which was at any time signatory to a contract calling for contributions to the Funds. That this case is of extreme importance to the coal industry and to federal labor policy was recognized by the district court when it stated:

> The interpretation of the evergreen clause has such far-reaching consequences for the coal industry, the Union, and federal labor law, that an expedited and final resolution of its meaning is imperative.

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The impact of the court of appeals' decision on federal labor law and national labor policy will be unprecedented. Not

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[4] The BCOA is effectively controlled by its largest members, who have traditionally compromised or controlled its negotiating committee. Therefore, it might be more accurate to say that the BCOA negotiates whatever is in the best interest of these companies.

[5] Approximately 30% of all bituminous coal produced in the United States is produced by members of the BCOA or companies who have contracts identical to the NBCWA. This figure does not include the former signatories who are the so-called "evergreen" defendants. In addition, many of the larger BCOA companies have extensive non-union operations. Thus, the clause affects hundreds of companies which constitute an extensive portion of the coal industry.

only are the respondents, as in the instant case, seeking to subject former BCOA members perpetually to the terms of the Trusts, they are seeking to impose the Trust requirements negotiated by the BCOA and UMWA on former signatories who have *no* contract with the UMWA. Under the respondents' theory, even those employers whose employees have decertified the UMWA as their bargaining representative are still subject to the terms of the Trusts and all their subsequent modifications. If the court of appeals' decision is permitted to stand, it will encourage other multi-employer collective bargaining associations to perpetuate their status by negotiating similar provisions binding companies to the results of future negotiations even after those companies no longer wish to be members of those associations. The petition should be granted in order that this Court may consider the full implications of the court of appeals' decision, which, if allowed to stand, would undermine the well-established federal structure of multi-employer collective bargaining.

SUMMARY OF ARGUMENT

Petitioners have more than adequately set forth the reasons why a perpetual waiver of a statutory right to bargain collectively violates federal labor policy. *Amici* will not repeat those arguments here. Instead, *amici* will demonstrate why such waivers should be prohibited given their impact upon employers who are no longer signatories or whose employees are no longer represented by the UMWA. In its attempts to waive the future bargaining rights of its members and other signatory companies, BCOA's purpose was to reserve those rights to itself, through the so-called "evergreen" clause. This attempt violates federal labor policy for several reasons.

First, it constitutes an unlawful permanent assignment of the former signatories' bargaining rights to the BCOA in violation of section 8(b)(1)(B) of the National Labor Relations Act. 29 U.S.C. § 158(b)(1)(B). It permits the BCOA to negotiate terms and conditions of employment solely in its own members'

best interest, while perpetually binding non-members to the results of those negotiations. If the court of appeals' decision is allowed to stand, it will discourage employers from joining multi-employer bargain associations.

Second, the "evergreen" clause would unlawfully interfere with the former signatories' employees' right to choose their own collective bargaining representative as guaranteed in section 7 of the NLRA. 29 U.S.C. § 157.

Third, the clause would compel non-signatory employers to make payments to the funds which violate section 302(a) of the Labor Management Relations Act. 29 U.S.C. § 186(a). Former signatories would be required to make payments indefinitely into funds from which their employees receive no benefit. This violates the requirement that such contributions be made for the sole and exclusive benefit of the employer's employees.

ARGUMENT

I. A PERPETUAL WAIVER OF AN EMPLOYER'S RIGHT TO ENGAGE IN COLLECTIVE BARGAINING ON ITS OWN BEHALF VIOLATES FEDERAL LABOR POLICY.

Petitioners correctly state that this is a waiver case. If the court of appeals' interpretation is correct, in negotiating the "evergreen" clause BCOA sought to perpetually waive the rights of signatories to bargain individually regarding pension and retiree benefits. The court of appeals refused to assign the label "waiver" to the case, but regardless of how it is denominated, the BCOA's permanent assignment to itself of the individual employers' bargaining rights is unlawful.

A. The Permanent Designation Of BCOA As A Former Signatory's Collective Bargaining Representative, As Required By The "Evergreen" Clause, Impermissibly Assigns Permanent Authority To The BCOA To Negotiate New Terms And Conditions Of Employment On Behalf Of The Former Signatory.

The nature of multi-employer bargaining is that it is purely voluntary. *Bonanno Linen Services Inc. v. NLRB*, 454 U.S. 404, 412 (1982). Section 8(b)(1)(B) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §158(b)(1)(B), provides that an individual employer may not be forced to join a multi-employer bargaining unit such as the BCOA. *NLRB v. Amax Coal*, 453 U.S. 322, 334-35 (1981).[6] It is well settled that an agreement

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[6] While this Court in *Amax* distinguished efforts by a union to compel an employer to contribute to a multi-employer trust fund from efforts to compel an employer to engage in multi-employer collective bargaining, that case did not address the question presented here. *Amax* was concerned with whether the funds' trustees were collective bargaining representatives within the meaning of Section 8(b)(1)(B). The Court held that they were not.

It is significant to note that the trust funds at issue in *Amax* did not contain the "evergreen" clause. That clause was not included in the trust documents until approximately three years after the events which lead to the unfair labor practice charges in *Amax*. Amax had participated in the funds in the past and the labor dispute centered on its decision not to participate any longer. Amax was in fact bargaining for itself concerning whether it would continue participating in the funds and the terms of its participation. Its complaint was that it would not have a representative on the funds' board of trustees, not, as is here, that the BCOA was in fact negotiating on its behalf concerning the terms of its participation.

This case presents the question of whether it is lawful to permit the BCOA and the UMWA to agree between themselves to permanently designate the BCOA as the collective bargaining representative of all companies who contributed to the funds. There is no question that BCOA is a collective bargaining representative within the meaning of Section 8(b)(1)(B). The only reason for its existence is to represent its members in collective bargaining.

to be bound by the results of future negotiations between an employer association and a union is tantamount to a designation of that employer association as a collective bargaining representative. In cases where a union has attempted to compel an employer to enter into such an agreement, the National Labor Relations Board has found that such pressure constitutes an unlawful interference with the employer's right to select its collective bargaining representative. *See, e.g., Laborers' Local Union No. 652 (Thoner Development Co.)*, 238 NLRB 1456, 1462 (1978); *Retail Clerks Union, Local 770 (Fine's Food Co.)*, 228 NLRB 1166, 1167-1168 (1977).

It is equally well settled that while an employer and union can bargain over wages, hours and working conditions of that employer's own employees, they cannot bargain over working conditions of employees outside the bargaining unit.[7] That is exactly what the court of appeals' decision would allow the BCOA and UMWA to do. Not only would BCOA have unilateral authority to bargain over benefits covering employees of other employers represented by the UMWA, it would have the same authority to bargain with employers whose employees are not represented by the UMWA. Thus, under the respondents' interpretation, as adopted by the court of appeals, the UMWA would continue to represent employees for benefit purposes even if it were decertified. Absent support by a majority of the employees in an appropriate bargaining unit, however, a union is prohibited from bargaining on those employees' behalf.[8]

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[7] "[T]here is nothing in [national] labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry." *United Mine Workers of America v. Pennington*, 381 U.S. 657, 666 (1965).

[8] "There could be no clearer abridgement of § 7 of the Act, assuring employees the 'right to bargain collectively through representatives of their own choosing' or 'to refrain from' such activity." *International Ladies' Garment Workers' Union, AFL-CIO v. NLRB*, 366 U.S. 731, 737 (1961).

As stated above the "evergreen" clause does not merely purport to bind former signatories to make ongoing contributions to the Funds at a fixed rate or to fund defined obligations agreed upon during a time when they were members of the BCOA. Instead, the "evergreen" clause, as interpreted by the court of appeals, confers a right upon BCOA to bind former signatories to new or modified terms or conditions of employment, without those companies having any right to participate in the negotiation of, or consent to the acceptance of, such terms. Thus, the "evergreen" clause serves only to perpetuate the BCOA in its status as a collective bargaining representative.

As interpreted by the court of appeals, the "evergreen" clause obligates a former signatory on a perpetual basis[9] to participate fully in the Trusts under whatever terms and conditions the UMWA and BCOA establish without regard to whether that company is a member of BCOA or even whether its employees continue to be represented by the UMWA. Indeed, under such an interpretation, BCOA may use that authority in a manner directly adverse to the interests of the former signatory.

Since the so-called "evergreen" companies have no voice in the negotiations, the UMWA and BCOA would have the ability to increase benefits and to alter the contribution formulae in a manner that advances the competitive interests of certain BCOA members. They would have the ability to discriminate in the delivery of benefits from the Trust's resources against companies that have withdrawn from BCOA. They could permit new beneficiaries to join the Funds, to be paid for by former

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[9] Respondents have disputed the characterization of the obligation as "perpetual", arguing that it is not perpetual since it lasts only so long as the UMWA and BCOA agree to subsequent NBCWA's. Such an argument misses the point. It is precisely because the BCOA is the only employer party who decides how long the obligation will exist, and in what form it will take, that the clause constitutes an unlawful reservation of bargaining rights to the BCOA. What is undoubtedly perpetual under the "evergreen" clause is the BCOA's authority to bargain on behalf of the former signatories.

signatories. Such actions by BCOA are not theoretical or speculative. Since 1978, BCOA has undertaken each and every of the described activities.

1. The BCOA and UMWA Can Increase and Have Increased Benefits Without The Consent of Former Signatories.

Since 1978, there have been numerous important substantive changes in benefits provided by the various Trusts. Pension benefits have been increased substantially. For example, in the 1988 NBCWA, the BCOA agreed to a pension change that could boost benefits by more than 40% from the prior agreement. The surviving spouse benefit also has been increased from 50% (J.A. 714) to 75% (J.A. 725). The death benefit has been increased and the responsibility for payment thereof has been transferred from certain signatory companies to the Funds (J.A. 194). In 1988, the level of reimbursement to providers was substantially increased, thereby greatly increasing the cost to the Trusts of providing benefits, without any offsetting benefit to participants and beneficiaries.[10] The so-called "evergreen" companies had no input in these decisions.

2. The BCOA and UMWA Can Modify and Have Modified the Contribution Formula To Benefit BCOA's Larger Members, To The Corresponding Disadvantage of Small Members and Former Signatories.

Prior to 1988, the formula for contributions to the 1950 Benefit Trust was based solely upon tons of coal produced by a signatory. Under the 1984 NBCWA the contribution formula for the 1950 Benefit Fund was 61 cents/ton (J.A. 710).

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[10] The increase served to help equalize the amounts paid to providers by the Trusts and amounts paid by BCOA companies to providers who served BCOA companies' active employees.

The 1988 NBCWA dramatically altered this formula. For the first time contributions to all the Funds were based solely upon classified hours worked.[11] The initial contribution rate to the 1950 Benefit Fund was $1.83 per/hour (J.A. 722). This change in the funding formula altered the competitive balance among employers.

Coal is generally sold in the market on a dollar per ton or cents per million btu basis. Therefore, with due regard for quality differentials, competition is based upon a head-to-head price-per-ton comparison. The changed formula favors the large producers which control BCOA. They are able to mine large amounts of coal while using fewer workers through the use of long walls and large draglines. For example, at a contribution rate of $1.83 per hour, a company able to produce six (6) tons per manhour pays a contribution of approximately thirty cents ($.30) per ton whereas a company producing two (2) tons per manhour pays a contribution of approximately ninety-one cents ($.91) per ton.

When the combined rates of all the Trusts is taken into account, the differential between a mine producing six tons per hour versus a mine producing two tons per hour reach additionally adverse levels. In a market where prices for spot coal have declined to approximately $20 per ton, this is a significant competitive factor.

The impact of this change is particularly stark with respect to a company which only cleans or transports coal. Because contributions to the 1950 Benefit Trust under the 1984 NBCWA were based solely upon tons mined, such a company did not have any tonnage to report, and thus was not required to make any contributions whatsoever to the 1950 Benefit Trust. In the 1988 NBCWA however, the contribution formula was changed to a

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[11] The only exception was a royalty applied to coal purchased or acquired by the signatory company from non-signatory sources.

dollar/hour formula. Therefore, under the court of appeals' interpretation, even if such a company withdrew from BCOA upon the expiration of the 1984 NBCWA, and even though it had not been required to make contributions to the 1950 Benefit Fund while it was a member of BCOA, it now finds itself faced with a contribution obligation under a formula negotiated *after* it lawfully withdrew from BCOA.

3. The BCOA and UMWA Have Negotiated Terms Which Discriminate in Favor of Signatory Companies, and Would Have the Power to Do So in the Future.

As executed, the 1988 NBCWA required signatory employers to pay a life insurance benefit of $3,500 upon the death of a 1974 Plan pensioner of the signatory employer (J.A. 726). In 1991, however, the BCOA executed a Reopener Agreement with the UMWA under which the death benefit payment obligation was increased to $5,000 and the obligation to make the payment was shifted from the companies to the 1974 Pension Trust (J.A. 194). Of course, the former signatories were not entitled to participate in the negotiations over the Reopener Agreement.

The benefit of the Reopener Agreement did not flow to every signatory employer. Instead, the Reopener Agreement provided that non-BCOA signatory employers could obtain the transfer of this payment obligation only if they were already signatory to a standard NBCWA and the 1991 Wage and Pension Reopener Agreement with the UMWA. So-called "evergreen" companies that had reached separate agreements with the UMWA, were still bargaining with the UMWA, or which no longer had any bargaining relationship with the UMWA could not conceivably receive any benefit from this transfer.[12] Yet, under the court of appeals' decision that the

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[12] Respondents argue that "*any*" contributing employer could take advantage of this provision simply by signing the Reopener Agreement. Op-

"evergreen" clause requires such companies to be bound to contribution rates to the 1974 Pension Fund identical to BCOA companies, the non-signatory companies must help pay for the UMWA-BCOA agreement transferring the BCOA companies' death benefit obligation to the 1974 Pension Fund.

The foregoing examples illustrate the permanent competitive advantage which the court of appeals' decision would confer on the BCOA. There is no legitimate labor policy objective served by allowing the BCOA to assign to itself the power to make such changes on a permanent basis. Neither the Trustees, the UMWA, nor the BCOA have a legitimate interest in controlling who will represent the "evergreen" employers for the purposes of addressing such ongoing collective bargaining issues. To the extent that the "evergreen" clause purports to permit the UMWA and BCOA to change such terms and conditions for the former signatories, it serves only to perpetuate the BCOA in its status as the collective bargaining representative for the "evergreen companies".

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position at 9 n.12. However, the respondents' argument itself demonstrates that the "evergreen" clause would force employers to use the BCOA as their bargaining representative. In negotiating the Reopener, BCOA has said, in effect: "We have agreed with the UMWA that you must financially support this new arrangement, whether you receive any benefit or not. If, however, you want to receive any benefit for the money we have agreed that you will pay, you must sign the Reopener with the UMWA." Further, the respondents' argument is certainly not true for employers whose employees have decertified the UMWA. Signing such a collective bargaining agreement in those circumstances would violate Section 8(a)(2) of the NLRA. 29 U.S. 158(a)(2). Under the petitioners' theory, these employers must still pay money to the funds, part of which will go to pay the death benefit obligations of BCOA members.

B. The Court Of Appeals' Decision Will Undermine Multi-employer Collective Bargaining, Since Few Employers Will Join A Collective Bargaining Association If That Association Can Obtain Perpetual Negotiating Rights.

It is well settled that once bargaining has commenced employers are not free to withdraw from multi-employer bargaining absent mutual consent or other "unusual circumstances". *Bonanno Linen Service v. NLRB*, 454 U.S. 404 (1982). Such "unusual circumstances" will be found only where an employer is subject to extreme financial pressures or where a bargaining unit has become substantially fragmented. *Id.* at 411. An employer may not reject a multi-employer contract merely because it does not agree with its terms.[13] On the other hand, the employer is free to withdraw from the multi-employer bargaining unit upon proper notice prior to bargaining and bargain for a new, individual contract after the expiration of the multi-employer agreement. *Id.* at 412. In adopting the rule that an employer could not withdraw after bargaining had begun, neither the NLRB nor this Court could have intended that the employer could be bound by a provision negotiated by its agent which arrogated to that agent the authority to bargain for the employer in perpetuity.

In view of these considerations, it would be a manifest injustice to bind an employer to an association agreement which creates a perpetual obligation to comply with the results of future negotiations. Such an agreement extends well beyond the scope of legitimate multi-employer bargaining and serves no legitimate policy of labor law. To find that an employer, having

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[13] *See, e.g. Falkowski Grocery*, 236 NLRB 473, 475 (1978) ("It is well established Board law that an employer who enters a multi-employer bargaining group is not free to examine the product of such negotiations to decide whether to accept those terms but must abide by the terms of that agreement negotiated on a group basis.").

once joined multi-employer bargaining, could be compelled to remain bound in perpetuity to future negotiations, threatens the basic concept of multi-employer bargaining. No employer would ever join multi-employer bargaining if it knew that it was risking a permanent loss of its bargaining authority.

C. Under The Respondents' "Evergreen" Theory, The Former Signatories' Employees Have Perpetually Waived Their Right To Choose Their Exclusive Bargaining Representative.

Section 7 of the NLRA guarantees employees the right to engage in collective bargaining through an exclusive representative, as well as the concurrent right to refrain from engaging in collective bargaining. 29 U.S.C. § 157. A trust fund's retention of contributions for employees no longer represented by the relevant union "strikes at the very core of collective representation" by forcing the employees into a "devil's alternative" of either forfeiting their right to contributions or retaining a collective bargaining representative with whom they are less than satisfied. *Local 50, Bakery and Confectionery Workers' Union v. Local 3, Bakery and Confectionery Workers' Union*, 733 F.2d 229, 233 (2d Cir. 1984). If the "evergreen" clause imposes continuing obligations on non-signatories, the UMWA retains the exclusive right to negotiate regarding pension and retiree health benefits regardless of whether the affected employees continue to be represented by the UMWA for purposes of collective bargaining. By retaining this right, the UMWA has waived the employees' right to select another representative.

This waiver can result in a detriment to those employees who are no longer represented by the UMWA for purposes of collective bargaining. A perfect example of this is the Reopener Agreement discussed above. An employer whose employees are no longer represented by the UMWA cannot obtain the

increased death benefits which were provided by 1974 Pension Trust under the Reopener Agreement.

Thus, the "evergreen" clause, as interpreted by the court of appeals and applied by the respondents, induces employees to retain the UMWA as their representative, and waives their right to withdraw the UMWA's authority to act as their representative with respect to pension and health benefits. Such agreements, however, are prohibited by the National Labor Relations Act. In *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322 (1974), this Court held that a union may not waive employee's rights relating to their choice of a bargaining representative. As this Court explained in *Metropolitan Edison Company v. NLRB*, 460 U.S. 693, 705-706 (1983), a "union may bargain away its members economic rights, but it may not surrender rights that impair the employees' choice of their bargaining representative."

Accordingly, under the respondents' theory, not only does the "evergreen" clause waive the employer's right to withdraw from multi-employer bargaining, it waives their employees' right to have a free choice in their selection of an exclusive collective bargaining representative as well.

II. THE COURT OF APPEALS' DECISION WOULD COMPEL EMPLOYERS WHO ARE NO LONGER SIGNATORIES TO MAKE PAYMENTS TO THE TRUSTS WHICH ARE ILLEGAL UNDER SECTION 302(A) OF THE LABOR MANAGEMENT RELATIONS ACT.

Section 302(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186(a), generally prohibits an employer from paying money or any other thing of value to any "representative" of the employer's employees. Trustees of union affiliated trust funds are "representatives" within the meaning of section 302(a) and, thus, are subject to the prohibition of

section 302(a). *See, e.g., Moglia v. Goeghegan*, 403 F.2d 110, 116 (2nd Cir. 1968), *cert. denied*, 394 U.S. 919 (1969).

The legislative history of the Taft-Hartley Act is replete with Congressional concerns about former UMWA President John L. Lewis using employer fringe benefit contributions to create a war chest for the United Mine Workers. *See*, e.g. S. Rep. No. 105, 80th Cong., 1st Sess. 53 (1947); 93 Cong. Rec. 4875-76 (daily ed. May 8, 1947). To address these concerns, the Congress enacted, inter alia, LMRA section 302(c)(5). 29 U.S.C. § 186(c)(5). From that time on, for a period of over forty years, the UMWA Funds have been required to comply with section 302(c)(5). *See UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982). The court of appeals' decision undermines that forty-year history of the Trusts' compliance.

Employers with no current contract with the UMWA are precluded by section 302(c)(5) from making the payments which petitioners seek under the continuing contributions theory, because such payments would violate the requirement that contributions must be for the "sole and exclusive benefit" of the employees. The "sole and exclusive benefit" provision ensures that, like wages, payments to a trust fund which are in exchange for employees' labor are protected, so that employees may enjoy the "sole and exclusive benefit" of their efforts. *Demisay v. Local 144 Nursing Home Pension Fund*, 935 F.2d 528, 533 (2d Cir. 1991) *cert. granted*, 112 S. Ct. 2990 (June 22, 1992)(No. 91-610).[14] Employees who will never receive any benefit from a trust fund, for example because they have chosen

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[14] This case raises an issue which is one step beyond *Demisay*. There, the Court has been asked to determine whether or not contributions already paid in to a fund must be transferred to a new fund to cover employees of employers who have withdrawn from the original multi-employer plan. This case involves the question of whether the employer can be compelled to pay *future* contributions after it has withdrawn from a plan from which its employees will not receive any benefit.

a different collective bargaining representative, do not receive the "sole and exclusive benefit" envisioned in Section 302(c)(5). *Id.* at 534. Thus, coal industry employees whose current employers have no contract with the UMWA would gain no benefit from the payments which the respondents seek.[15] Payment of those contributions would violate section 302(c)(5).

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[15] Although respondents have been providing benefits to retirees of some "evergreen" employers since approximately 1990, this contrasts with their practice between 1978 and 1990, which was to deny benefits to employees for time worked for an employer that was not then a signatory to an agreement with the UMWA. *Amici* submit that this earlier, pre-litigation practice is the only practice which reasonably comports with the language of the trust documents.

CONCLUSION

The petition raises issues of critical importance for the coal industry in particular and the future of multi-employer collective bargaining in general. If the court of appeals' decision is allowed to stand, few if any, employers will agree to join multi-employer collective bargaining associations since they cannot do so without the fear that the association and union will permanently waive the individual employer's and his employees' rights to negotiate on their own behalf. This constitutes an important question of federal labor policy which must be addressed by this Court.

For these reasons, we urge the Court to grant the Petition for Writ of Certiorari.

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Respectfully submitted,

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